

SURFACE WATER RIGHTS

OVERVIEW

A water right is a legally protected right, granted by law, to take possession of water and put it to beneficial use. The two most common types of surface water rights in California are riparian and appropriative. Under the California Water Code, the [State Water Resources Control Board \(SWRCB\)](#) is responsible for allocating surface water rights and permitting the diversion and use of water throughout the State. Through its Division of Water Rights, the SWRCB issues permits to divert water for new appropriations or to change existing water rights. The SWRCB attaches conditions to these permits to ensure that the water user prevents waste, conserves water, does not infringe on the rights of others, and puts the State's water resources to the most beneficial use in the best interest of the public.

Riparian water rights are entitlements to water that are held by owners of lands that border natural flows of water. A landowner has the right to divert a portion of the natural flow for reasonable and beneficial use on his or her land if it is within the same watershed as the natural flow. If natural flows are not sufficient to meet reasonable beneficial requirements of all riparian users on a stream, the users must share the available supply according to each owner's reasonable requirements and uses. Natural flows do not include groundwater that is pumped, is used (e.g., for irrigation), and flows into a watercourse; water seasonally stored and later released; or water diverted from another watershed.

Appropriative rights are entitlements to water obtained through conditional permits or licenses from the SWRCB. These authorizations contain terms and conditions to protect prior (senior) water right holders, public trust resources such as fish and wildlife, and the public interest. The SWRCB authorizes and regulates water diversion and storage in upstream reservoirs and diversion and export from the Delta under appropriative water rights.

An applicant, permittee, or licensee who wishes to change the point of diversion, place of use, or purpose of use from that specified in an existing permit or license must petition the SWRCB to amend a water right. When considering a petition for a water right amendment, the SWRCB considers the same factors as those it considers when a water user applies for a new permit, such as waste prevention, water conservation, infringement on the rights of others, and the best interest of the public.

[Figure 13](#) illustrates the process for obtaining a water right permit.

WHO NEEDS TO COMPLY?

Anyone proposing changes in the point of diversion, place of use, or purpose of use of existing appropriative water rights must petition the SWRCB for an amended water right. A water user seeking to change the quantity of water used under an appropriative water right, or the season when it is used, must apply for a new water right permit. Also, anyone without a current

water right who wishes to obtain the right to divert and use water must apply for a new water right.

CALFED actions that would require compliance with SWRCB water right regulations include those involving:

- diversion of water not authorized under an existing water right,
- purchase or transfer of water rights,
- change in use or change in the diversion point of water under an existing water right, and
- appropriation of water for use on nonriparian land.

WHO IS EXEMPT?

Underground water is not subject to the permit procedure unless it is the underflow of a surface stream or otherwise flows in a subterranean stream within a known and definite channel. An entity that proposes to pump groundwater (with the exceptions noted) need not file an application. With certain exceptions, anyone who pumps groundwater in Riverside, San Bernardino, Los Angeles, or Ventura Counties is required to file a notice with the SWRCB because of the low rainfall, high population density, and urbanization of these areas and their dependence on groundwater supplies.

A permit is not required to properly exercise a riparian right. Persons or organizations that divert water under a riparian claim or a claim of appropriative right initiated before December 14, 1914, however, must file a Statement of Water Diversion and Use with the SWRCB.

HOW LONG DOES THE APPROVAL PROCESS TAKE?

Obtaining or amending a water right can be complicated and time consuming; it can take approximately 6 months if there are no protests. Controversial water right applications with unresolved protests require a water right hearing, which may lengthen the approval process.

WHAT INFORMATION DOES THE APPLICANT NEED TO PROVIDE?

The applicant must provide details about the following:

- the source of water at the point of diversion, the water body to which it is a tributary, and alternative sources of water available for the proposed project;
- locations of and ownership of land at the point of diversion;
- purposes of use of diverted water;
- amounts, seasons, and places of use of diverted water;

- diversion and storage facilities;
- project schedule; and
- the applicant's existing right to the water under consideration.

Some applications must also be accompanied by a description of environmental considerations, such as other permits and approvals related to the proposed action; environmental and archaeological reports prepared; and vegetation, fish, and wildlife resources that could be affected by the proposed action (including color photographs of vegetation).

WHAT IS THE FEE?

The SWRCB assesses a filing fee of at least \$100 and a permit fee of \$100 or more. Total fees are based on the amount of water to be diverted and stored. The SWRCB also acts as a collection agent for the Department of Fish and Game's CEQA review fees.

WHAT DOES THE APPLICATION AND EVALUATION PROCESS ENTAIL?

The steps in the approval process are as follows:

1. The applicant files an application for a new or amended water right with the SWRCB.
2. The SWRCB issues a notice of application, which the applicant posts or publishes.
3. If the SWRCB receives protests, it may refer the dispute to mediation or nonbinding arbitration. If protests cannot otherwise be resolved, the SWRCB holds a formal or informal hearing. The SWRCB has the discretion to hold a hearing on an unprotested application as well. The purpose of a hearing is for the SWRCB to obtain evidence necessary to support a decision on the application. Hearings include:
 - presentation of exhibits by SWRCB or regional water quality control board staff members,
 - presentation of evidence by the applicant and other parties,
 - cross-examination of parties' witnesses by other parties and SWRCB staff, and
 - redirect and cross-examination.
4. The SWRCB reviews the application and analyzes the environmental impacts of the proposed appropriation in compliance with CEQA.
5. If the SWRCB approves the application and the applicant has paid the permitting fees, the SWRCB issues a permit. A reasonable time is allowed for the applicant to

begin construction of the diversion works, complete the construction, and make full beneficial use of the water.

6. When the construction is complete, the terms of the permit are met, and the largest volume of water allowed under the permit is put to beneficial use, the SWRCB confirms the terms and conditions and issues a license to the appropriator. The license is the final confirmation of the water right and remains effective as long as its conditions are fulfilled and beneficial use continues.

To modify an existing appropriative, riparian, or other water right to preserve or enhance wetlands habitat, fish and wildlife resources, or recreation in or on the water, the water right holder may petition the SWRCB to change the purpose of use to instream flows. The amendment would allow the water right holder to maintain rights to the water even though the right would be dedicated to instream use.

DOES THIS PROCESS TRIGGER THE NEED FOR COMPLIANCE WITH OTHER REGULATIONS?

The Division of Water Rights' approval of an application for a new water right or an amendment to an existing water right or license requires CEQA compliance.

WHAT ARE THE OPPORTUNITIES FOR FACILITATING COMPLIANCE WITH THIS PROCESS?

The following are recommended steps to simplify and streamline the water right permitting process for CALFED actions.

- **Consult with legal counsel familiar with water right law.** Water right issues in California are complicated and involve intricate legal concerns that considerably exceed common understanding of environmental regulations. These issues are also extremely controversial and can involve many different parties with conflicting interests. It may be appropriate, therefore, to engage legal counsel familiar with water right law to investigate the status of water rights on any affected waterway, including the number, sizes, locations, types of use, and seasons of use of the existing water rights.
- **Assess the potential for protests and attempt to resolve potential conflicts with other water right holders.** Determining whether a water right application is controversial may help indicate the level of analysis and process required by the SWRCB. One way to anticipate potential protests is to investigate whether the stream specified is adjudicated (water diversions are under the control of an appointed water master) or fully appropriated (flows allocated under water rights equal or exceed available flows) and whether any current or historical water right litigation could constrain future permit applicants. Anticipating the controversial issues before applying to the SWRCB may help the project proponent determine the feasibility of the project or the availability of mitigation to address potential concerns; it may also help SWRCB staff prepare for the protests that could arise.

It may be appropriate to enter into early discussions with major downstream water right holders and attempt to negotiate project design and operational features that will accommodate their interests. Anticipating protests and avoiding them through project redesign will help SWRCB staff members prepare an adequate administrative record that supports the decision to approve the water right permit.



Go to Next Regulation